No. 80-1405

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NELSON H. SHAPIRO, ET AL., Petitioners,

v.

GENERAL MOTORS CORPORATION, ET AL., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

(1) Did the courts below properly deny petitioners standing under the antitrust laws because their injury was too remote and incidental where petitioners claimed that no seat belts were produced from their patented inventions because of the impact of respondents' purchasing policies upon seat belt manufacturers?

(2) Did the courts below properly hold that respondents' allegedly similar purchasing policies do not violate the antitrust laws by reason of "conscious parallelism" or "shared monopoly"?

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OPINIONS BELOW

Respondents adopt the statement of the opinions below submitted by petitioners.

JURISDICTION

Respondents adopt the statement of jurisdiction submitted by petitioners.

STATEMENT OF THE CASE

This lawsuit has been pending since 1971. The sole basis for petitioners' claims is a supposed purchasing policy of each respondent automobile manufacturer, which is allegedly imposed upon seat belt manufacturers.

Petitioners are an attorney and a psychiatrist who claim to have invented certain seat belt apparatus in their spare time. They have never manufactured or distributed any of those apparatus. (A. 548-49)[1] The respondents are manufacturers of motor vehicles which purchase finished seat belt assemblies from independent companies. The petitioners allege that each respondent requires a seat belt manufacturer to grant it, as part of the consideration for a contract to supply a percentage of that respondent's requirements, a royalty-free sub-license for the balance of its requirements. (A. 18) Petitioners claim that this purported practice prevented them from exploiting their patented seat belt inventions. Despite petitioners' efforts to interest automotive seat belt manufacturers in their seat belt inventions, only one ever licensed them. (A. 66, 381, 425, 550, 559, 800). However, even this manufacturer, although it paid petitioners minimum royalties of approximately $95,000 never developed their inventions. Instead, it developed the invention of another private inventor. (A. 366, 427-29, 619-25, 661-64, 788, 801)

After years of discovery, thorough briefing, and long argument on cross motions for summary judgment, the District Court granted partial summary judgment in

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[1] References marked "A." are to the Joint Appendix filed with the Court of Appeals. "Pet." will refer to the Petition for a Writ of Certiorari filed in this Court.

favor of respondents and denied partial judgment to petitioners on the following grounds, among others: (i) petitioners lacked antitrust standing, not because they were patent holders, but rather because any injury they may have suffered was too indirect, incidental and speculative, (ii) petitioners had failed to show any illegal conspiracy or monopoly, and (iii) petitioners were not entitled to control the pricing negotiations between seat belt manufacturers and automobile manufacturers. (Pet., B1-B56).

The District Court observed that nothing in the record was shown to have prevented Petitioners from insisting on any payment they desired for their patent rights or refusing to license them. The Court concluded:

> "There is no evidence or even innuendo that the result of which plaintiffs complain was anything but the by-product of negotiations freely entered into. Again, the suspicion arises that plaintiffs are upset primarily because they did not receive more money. Receiving $95,000 for an invention which was not even marketed and which was produced by a lawyer and a psychiatrist in their spare time is not necessarily a return so insufficient as to deter plaintiffs from ever inventing again." (Pet., B54-55).

The Court of Appeals for the Fourth Circuit affirmed the District Court's judgment.

ARGUMENT

In their petition, petitioners continue their search for an antitrust theory which would allow the terms of respondents' seat belt purchase agreements to be dictated by petitioners rather than by the contracting parties.

The petitioners seek review on (i) a contrived constitutional issue of due process of law pressed in this Court essentially for the first time which issue is in conflict both with the facts of the case and with precedent determining who has standing to sue under the antitrust laws; and (ii) spurious questions whether the respondents shared some type of unlawful monopoly power in some amorphous market.

The arguments of petitioners were properly rejected by the courts below. The trial judge and the Court of Appeals applied universally recognized principles of law to undisputed facts in reaching their decisions. Respondents submit that there is simply no issue in this long-pending litigation which warrants the attention of this Court.

A. THE ISSUE OF STANDING IS NOT APPROPRIATE FOR CERTIORARI IN THIS CASE

1. No Constitutional Issue Is Presented by This Case.

Petitioners' attempt to elevate the standing issue in this case to a constitutional question has no support. The only prior reference of any sort to the Constitution was a one-sentence aside in the petitioners' main brief in the

Fourth Circuit. There, as here, no explanation was offered as to the basis of the claim.[2] Aside from the impropriety of pressing upon this Court an argument not considered by the Court of Appeals (See *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)), the argument itself has no merit. It is based entirely on a misstatement of the holdings of the courts below.

Respondents never argued, nor did either court hold below, as petitioners now claim, that an inventor lacks antitrust standing merely because he has a patent. Rather, they held that petitioners' patents give them no additional rights under the antitrust laws which they would not have otherwise.

As the District Court explained, "[t]he theory of recovery advanced by [petitioners] would extend the scope of their patent monopoly well into the licensing stage, enabling them to exercise leverage as to the deal eventually concluded between [petitioners' licensee] and the automakers, obviously an improper result." (Pet., B52). In so holding, the District Court was following an unbroken line of authorities, in this Court and the lower courts, which have forbidden patentees to dictate the compensation to be paid by a remote potential buyer or licensee to an immediate potential buyer or licensee. See, e.g., *United States v. Univis Lens Co.*, 316 U.S. 241, 250,

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[2] The only discussion of the supposed Fifth Amendment issue in any of the voluminous pleadings below appears at page 45 of petitioners' main brief in the Court of Appeals and reads in its entirety as follows:

> To bar one engaged in the business of designing, inventing, and licensing from the protection of restraints in this business that are violative of the antitrust laws would appear, moreover, to be an unconstitutional discrimination (Fifth Amendment).

252 (1942); *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502, 516 (1917); *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1137 (5th Cir. 1976).

Petitioners' legitimate property rights in their patents were not damaged or impaired by the alleged antitrust violation or by the lower courts' decisions. Anyone who believes that petitioners' invention is "the better mousetrap" must meet petitioners' terms in order to use it. On the other hand, petitioners have no rights, by virtue of their patents, to require respondents to pay any particular form or amount of compensation to seat belt manufacturers.

This, however, has nothing to do with standing under the antitrust laws. The District Court held that petitioners' patents did not place them in a favored antitrust position, not (as petitioners contend) that their patents placed them in a disfavored antitrust position.

2. Petitioners' Alleged Injuries Are Too Remote and Speculative.

The lower courts held that the petitioners lacked standing due to the remote and derivative nature of their claims, not because they were patent holders. As the District Court emphasized, its holding as to standing turned on "the question of the remoteness of the alleged injury, i.e., the relationship between the alleged antitrust violation and the injury inflicted on plaintiffs" (Pet., B47).

Petitioners are not seat belt manufacturers, but merely part-time inventors who hoped to license a manufacturer to make and sell seat belt systems using their inventions.

Petitioners' alleged injury is that no manufacturer of automobile seat belt systems ever developed a product using their inventions.

According to petitioners, the reason that seat belt manufacturers used the inventions they did, rather than petitioners' inventions, is that the terms by which respondents dealt with seat belt manufacturers made it economically unattractive for these seat belt manufacturers to agree to the terms demanded by petitioners.

As the District Court summarized the nature of petitioners' argument: " 'But for X's activities, I would have licensed my patent and become rich.' In this patent case, the 'but for' element plays a substantial role, since plaintiffs are alleging that but for defendants '. . . licensing policy, they would have struck a deal with one or more of defendants' suppliers and received the appropriate royalties.' " Pet., B37). To reach this result, one must not only speculate that a seat belt manufacturer would have granted petitioners a license, but that it would have developed successful products under it, and sold them to respondents, in lieu of the products which in fact were developed and sold.

Regardless of how the various courts have phrased the tests for antitrust standing, they are unanimous in rejecting claims as remote and derivative as this one. As this Court has repeatedly held, the antitrust laws do not provide a remedy for every loss that conceivably might be traced to an alleged antitrust violation. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). The Fourth Circuit is one of many employing a "target area" test for determining standing under Section 4 of the Clayton Act. A plaintiff must show that he was within the sector of the economy in which the antitrust violation threatened

a breakdown of competitive conditions and that the alleged violation proximately injured him. *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.) *cert. denied*, 385 U.S. 934 (1966). Standing is denied to plaintiffs whose alleged injuries are "merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative . . ." *Id.* at 419.

As discussed *supra*, any injury to petitioners can only be derived from seat belt manufacturers' independent reaction to the effect of the respondents' alleged purchasing policies upon them. As noted in the District Court's opinion (adopted by the Fourth Circuit), the injury alleged by petitioners is "both indirect and incidental . . . the impact reaches them only as a result of loss of royalties which, in turn, follows from the business agreement between the licensees (suppliers) and the car manufacturers" (Pet., B49). Such derivative and incidental injury is not a sufficient basis for standing under the test employed by the Fourth Circuit or by any other court. See, e.g., *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *General Communications Engineering, Inc. v. Motorola Communications and Electronics, Inc.*, 421 F. Supp. 274 (N.D. Cal. 1976); Areeda and Turner, Antitrust Law, Volume II, at Section 341(c) p. 220.

The question presented by the petitioners is not new to the courts. Courts have uniformly denied standing to licensors who have sought to recover royalties which they would have received but for the alleged effects

of anticompetitive restraints on licensees.[3] For example, in two cases, one older and one more recent, the Court of Appeals for the Second Circuit addressed the question of whether a patent holder can recover because of the anticompetive restraints on its licensees. In both, the court held the patent holder had not alleged injury suficient to give it standing, and furthermore, that its loss of royalties was not an injury sustained because of the licensee's antitrust violations. See, e.g., *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166, 169-70 (2 Cir.), *cert. denied*, 395 U.S. 943 *reh'g. denied*, 396 U.S. 869 (1969); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678, 679-80 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

Petitioners' claims in this case are even one step more remote than those in other loss of royalty cases. Whereas, the plaintiffs in other cases have typically alleged lost royalties under existing licenses, petitioners in this case never had a licensee who produced a product using their invention. They merely allege they *would have* been able to enter a successful licensing arrangements, and the licensees *would have* produced successful products using their inventions, but for the respondents' alleged antitrust violation.

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[3] The dicta in footnote 10 of *In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2 122 (9th Cir. 1973). *cert. denied sub nom., Morgan v. Automobile Manufacturers Assn., Inc.*, 414 U.S. 1045 (1973), cited by petitioners in a weak attempt to allege a conflict among the circuits, did not deal with the issue of an inventor claiming loss of revenue from a third party affected by the alleged antitrust violation. The instant case is more similar to *Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979) wherein farm workers were denied standing to allege that the impact of antitrust violations eliminated jobs which would otherwise have been available to them.

B. PETITIONERS' ANTITRUST THEORIES ARE WITHOUT MERIT

1. Petitioners' Reliance on "Shared Monopoly" or "Conscious Parallelism" Theories Is Misplaced.

"We have no proof of conspiracy," counsel for petitioners told the District Court Judge Joseph Young at the hearing on cross motions for summary judgment (Pet., B18). That statement was made nearly seven years after the suit was commenced and after completion of all discovery. The undisputed facts in the record below showed that the seat belt manufacturers from which respondents purchased used the inventions of independent inventors, who received substantial sums (e.g., A. 620, 670). As noted, *supra*, even petitioners, whose inventions were never used in a product, received $95,000 in royalties from a seat belt manufacturer which developed the patents of another inventor. The gravamen of petitioners' case is that they believe the seat belt manufacturers should have produced — and respondents should have purchased — seat belts using petitioners' inventions rather than others.

It is in this context that one must view petitioners' loose references to "zero royalties" and effects upon a "market for automotive equipment innovation," from which petitioners have allegedly been excluded (Pet., 3, 8-10). Clearly, other independent inventors and even petitioners received substantial payments for the right to use their inventions. By using market-exclusion language, petitioners merely attempt to ascribe some broader significance to the fact that their "innovative" inventions eventually lost out to others in the

marketplace. Petitioners' present reliance upon theories of "shared monopoly" of "conscious parallelism" is necessitated by their desire to attribute their inventions' lack of acceptance to respondents' purchasing policies despite the admitted absence of any evidence of conspiracy.

There is simply no eivdence whatever that respondents prevented their seat belt suppliers from using "outside" inventions. As noted, *supra*, patented inventions of "outside" inventors were manufactured by seat belt suppliers and used by respondents in their vehicles. As the District Court pointed out, there would be no rational reason for the respondents to deprive themselves of the potential benefit of an economically feasible "innovative" invention from an independent source (Pet., B15). Moreover, even if respondents had chosen to use their own employees' inventions rather than those of outsiders, they would be perfectly free to do so without incurring antitrust liability. *Call Carl, Inc. v. B. P. Oil Corp.*, 554 F.2d 623, 628 (4th Cir. 1977).

2. Petitioners' Claim of "Conscious Parallelism" Is Without Merit

Petitioners have admitted they have no evidence of conspiracy between the respondents. They have shown no more than contracts to supply seat belt systems at negotiated terms between the respondents and their various suppliers. Despite petitioners' protestations of "conscious parallelism" (Pet., 7), there is no evidence that respondents were aware of each other's licensing policies or that either respondent's policies were patterned after those of the other. Indeed, the only evidence in the record on point is directly to the

contrary (A. 495, 502-03, 541-42). In any event, the authorities uniformly recognize that "conscious parallelism," even if it exists, by itself, does not violate the Sherman Act. See, e.g., *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954); *North Carolina v. Chas. Pfizer & Co.*, 537 F.2d 67, 76 (4th Cir. 1976).

3. Petitioners' Claim of "Shared Monopoly" Is Equally Frivolous.

Petitioners have not produced any facts or a scintilla of evidence that respondents acted or intended to act in any manner as some type of single economic unit with the purpose or effect of destroying competition in any market in violation of Section 2 of the Sherman Act. Monopolization has been defined as (i) the possession of monopoly power in the relevant market, and (ii) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corporation*, 384 U.S 563, 570-71 (1966). Petitioners do not even attempt to raise either of these issues, or to show how these requirements have been satisfied by anything in the present record.

Indeed, petitioners have failed to define the market which is supposedly being monopolized, whether by a single monopolist or "shared" monopolists. Petitioners do speak vaguely of such otherwise undefined entities as a "market for automotive equipment innovation" (Pet., 3). The District Court aptly characterized such rhetoric as simply "an attempt to temper [petitioners'] profit-making motives with a general appeal to overall

consumer welfare" (Pet., B6). No proof of that market, the nature of the commerce, the identity of the competitors, or their market shares was ever proffered. The only alleged market shares in the petition relate to sales figures for "new cars produced in this country" (Pet., 5), which would scarcely define any area in which petitioners competed with the respondents, or even with the seat belt manufacturers. Petitioners' failure to delineate and substantiate in any way the relevant market completely disposes of the Section 2 claim. *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 918 (8th Cir. 1976).

Moreover, to the extent that petitioners rely upon a "shared monopoly" theory at all, they are in conflict with every case which has ever considered the issue. See, e.g., *Am. Tel. & Tel. Co. v. Delta Comm. Corp.*, 408 F. Supp. 1075, 1106 (S.D. Miss. 1976), aff'd, 579 F.2d 972 (5th Cir. 1978). There is simply no authority for adding the shares of independent entities in order to define a composite "monopolist."

4. Respondents' Alleged Purchasing Policies Are Lawful.

Federal law has required that seat belt systems be installed in various vehicles manufactured by respondents. Each respondent unilaterally adopted a multiple sourcing policy for seat belt systems to protect itself against a shutdown because of a strike, flood, fire, or other disruption of supply that could stall its whole production (A. 491, 564). No case has ever suggested that a multiple source procurement policy constitutes an unreasonable restraint of trade or that seeking patent rights as part of the consideration for a supply contract

violates anything in the patent or antitrust laws. A manufacturer may lawfully refuse to deal with a potential supplier if the terms offered are, or are perceived to be, inadequate. See, e.g., *FTC v. Raymond Brothers – Clark Co.*, 263 U.S. 565 (1924); *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306, 309 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); *Raitport v. General Motors Corp.*, 366 F. Supp., 328, 331 (E.D. Pa. 1973). Petitioners have no right whatever to regulate the respondents' purchasing policies. *Id.* Petitioners' dissatisfaction with respondents' presumed purchasing policies does not make those policies unlawful.

C. CONCLUSION

Petitioners have presented no evidence to suggest that the lack of acceptance of their inventions was due to anything but their failure to endure the rigors of the marketplace. As the District Court stated:

> Plaintiffs are not being destroyed by defendants' refusal to pay them royalties. If anything, plaintiffs are either bad businessmen, poor negotiators, excessively profit-motivated, or all three. The patent laws protect their invention, and they remain free to charge what they can get for their ideas. If they do not like the price, they simply do not have to sell. An aggrieved prospective purchaser will either do without the input or find available substitutes, possibly through "inventing around" the patent. (Pet., B15)

Petitioners took from the marketplace exactly what they brought — a patent covering a device which seat belt manufacturers found less attractive than others. The patent monopoly was not an insurance policy that their device would be used commercially or that petitioners' hobby would earn them an unusually handsome return on their investment.

Petitioners have not set forth specific facts to show that there is a genuine issue of fact for trial as required by Rule 56(e), Fed. R. Civ. P. Uniform precedent denies them standing because any alleged injury which they might have suffered is too indirect and incidental to have been caused by reason of an antitrust violation. Their counsel admits that they have no proof of any conspiracy. Their alleged theory of monopolization is illusory and not supported by any evidence. The antitrust laws cannot provide petitioners a windfall return on their alleged inventions after they failed to survive in the field of competition. To do so would capsize the Sherman Act, our comprehensive charter of economic liberty. *Northwestern Pacific Railroad Co. v. United States*, 356 U.S. 1 (1958).

The issues of this case were properly resolved by the District Court upon the basis of the record presented to it and properly affirmed. There is no conflict between the lower courts' holdings and any other decision of any court, nor any reason for this Court to prolong this particular litigation. The petition should be denied.

Respectfully submitted,

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